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No. 85-298

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In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,
Petitioner,

v.

ANDREW K. BURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS

THOMAS L. ROBERTS
(Counsel of Record)
FRIEDRICK C. HAINES

PRYOR, CARNEY AND JOHNSON
A Professional Corporation
6200 South Syracuse Way, #400
Englewood, Colorado 80111
Telephone: (303) 771-6200
Attorneys for Petitioner

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PRELIMINARY STATEMENT

Respondent, Dr. Burt, commenced the present litigation in October 1981 claiming defamation, breach of contract, interference with prospective advantage and outrageous conduct. Later, Dr. Burt amended his Complaint to add claims under 42 U.S.C.A. § 1983 that his civil rights, specifically his liberty and property interests, had been in-

fringed by the conduct of Dr. Connolly and the Board of Regents of the University of Nebraska.

The petitioner, Dr. Connolly, and his co-defendant below, the Board of Regents, filed motions to quash summonses and to dismiss. These motions were filed together with affidavits of Dr. Connolly and Richard R. Wood. Dr. Burt's responses to these motions included affidavits of Dr. Burt and Dr. Grant Steffen. The inclusion and consideration of these affidavits causes the motions to dismiss to be treated as motions for summary judgment under Fed. R. Civ. P. 56. (Fed. R. Civ. P. 12(b).; *see* Section IA, *infra.*) In the District Court in Colorado, Dr. Connolly and the Board of Regents prevailed after a brief hearing on the motions.

Dr. Burt, in his Suggestion of Mootness, now claims that his resources have been consumed, that he is unable to pursue this case further, and that therefore he will dismiss it voluntarily under Rule 41(a)(1). Thus, he claims, the case has become moot. This Suggestion of Mootness comes only after Dr. Connolly has been granted certiorari, after Dr. Connolly's brief on the merits has been filed, and after a brief for *amici curiae* on behalf of three concerned organizations has been prepared and filed.

Obviously, the request for a professional reference regarding Dr. Burt is not the only such request that Dr. Connolly has received and has responded to. Such requests are received and responded to by Dr. Connolly and his colleagues on the faculty of the University of Nebraska on a daily basis. Likewise, the membership of the three *amici* organizations receive and respond to such requests daily. Dr. Connolly and his colleagues are now faced with

a decision of the United States Court of Appeals for the Tenth Circuit, published in the Federal Reporter, Second Series, which holds, in effect, that they can be sued anywhere they send their response to these inquiries if their response does not contain a report which is favorable to the individual requesting the reference. Dr. Burt has apparently turned out to be the sort of litigant that is unwilling to be accountable for the processes he sets in motion by the commencement of his lawsuit. In view of the need to have a decision of whether the judgment of the Tenth Circuit represents the law of long-arm jurisdiction under the circumstances, there ought to be little sympathy for Dr. Burt's sudden unwillingness to take the final step of a thousand mile journey.

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ARGUMENT

I. This Case Has Not Become Moot

Despite Dr. Burt's present inclination to withdraw from this controversy, for the following reasons the case is not moot.

A. Dr. Burt Is Not Entitled To Unilateral Dismissal of This Case

Dr. Burt's Suggestion of Mootness asserts that he has "an automatic right" to dismiss this action. Yet the purpose of Fed. R. Civ. P. 41(a)(1) is to allow a unilateral dismissal of the case only during the early stages of litigation and before the defendant has committed substantial resources to defense of the action and obtained rights or advantages with respect thereto. *D.C. Electronics, Inc. v.*

Nartron Corp., 511 F.2d 294, 296-97 (6th Cir. 1975); *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953); *see also, Hudson Engineering Co. v. Bingham Pump Co.*, 298 F. Supp. 387 (S.D.N.Y. 1969). The attempt to unilaterally dismiss the case after it has proceeded through the Court of Appeals, after certiorari has been granted by the U.S. Supreme Court, and after the defendants and *amici curiae* have filed their principal briefs in this Court hardly comes at an early stage of litigation.

Further, Fed. R. Civ. P. 41(a)(1) provides that a plaintiff may dismiss an action without Court approval only "at any time before service by the adverse party of an answer *or of a motion for summary judgment . . . .*" (emphasis added). Rule 12(b) states that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall be treated as one for summary judgment* . . . .

Fed. R. Civ. P. 12(b) (emphasis added). Furthermore, Rule 12 also provides that a motion or responsive pleading may join any of the defenses enumerated in Rule 12(b). *Id.;* Fed. R .Civ. P. 12(g).

On December 11, 1981, Dr. Connolly and the Board of Regents filed their "Motion to Quash Service of Process and to Dismiss this Action For Lack of Subject Matter and *In Personam* Jurisdiction, Improper Venue, Insufficiency of Process and Service of Process and for Failure

to State a Claim Upon Which Relief Can Be Granted" (J.A. 10). Such motion included defenses under Rule 12(b)(1), (2), (3), (4), (5), and (6). In support of such motion, Dr. Connolly and the Board of Regents filed a brief (J.A. 15) and the affidavits of Dr. Connolly (J.A. 34) and Richard R. Wood (J.A. 38). Exhibits were also attached to Dr. Connolly's affidavit (J.A. 36 and 37). As well as supporting other defenses, these matters outside the pleadings were in support of Dr. Connolly and the Board of Regents' motion under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. (See especially affidavit of Richard R. Wood, J.A. 38 at ¶¶ 17-24.) Thus under Fed. R. Civ. P. 12(b) and for purposes of Fed. R. Civ. P. 41(a) (1), Dr. Connolly and the Board of Regents' motion of December 11, 1981 must be treated as a motion for summary judgment. *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 661-62 (5th Cir. 1979); *Tele-Views News Co. v. S.R.B. TV Pub. Co.*, 28 F.R.D. 303, 307 (E.D.Pa. 1961). Dr. Burt thus has no "automatic right" to dismiss his action under Rule 41(a)(1). This case does not become moot simply by Dr. Burt's announcement that he has filed a Notice of Dismissal pursuant to Rule 41(a)(1) in the District Court, which, under the circumstances, has no jurisdiction to act on the notice.

B. Dismissal Under Rule 41(a) (1) Is Without Prejudice And Would Leave Dr. Burt Free To Refile His Lawsuit, Frustrating Dr. Connolly's Attempts To Obtain This Court's Decision On The Merits

This is Dr. Burt's first attempt to dismiss this action voluntarily. Such dismissal would be without prejudice to his right to refile the lawsuit at some later date. Fed. R. Civ. P. 41(a)(1). Several of Dr. Burt's claims for relief,

including claims for breach of contract, interference with prospective advantage, outrageous conduct, and his claims for violation of his civil rights, are governed by a six year statute of limitations that has not yet expired. E.g., C.R.S. § 13-80-110 (1973). Dr. Burt would be free to refile his suit on these claims, thereby frustrating Dr. Connolly's attempt to obtain this Court's decision regarding his amenability to suit in Colorado.

In addition, since statutes of limitations are matters of affirmative defense, they are not an impediment to filing suit. Theoretically, Dr. Burt would be free to refile any of his claims at any time, leaving Dr. Connolly at his peril to assert the statute of limitations as an affirmative defense if such suit is refiled.

For these reasons, the mere desire of Dr. Burt to unilaterally dismiss this case does not render the question before this Court moot. This action should proceed to its conclusion. Dr. Burt's attempt to dismiss his action at this stage should be denied and the question of whether Dr. Connolly is subject to suit in Colorado should be finally determined.

C. The Issues Addressed In This Case Are Capable Of Repetition And Almost Inevitably Will Be Repeated

As chairman of his department at the University of Nebraska Medical School, Dr. Connolly frequently receives inquiries of the sort to which he responded in this case. These inquiries are often from outside the State of Nebraska, but the need to respond to out-of-state inquiries is no less compelling. *See* Brief of *Amici Curiae* at pp. 10-13. The situation faced by Dr. Connolly in this case is not only capable of repetition but almost inevitably will be repeated.

The situation presented by this lawsuit is not faced only by Dr. Connolly. As evidenced by the appearance of three national educational organizations as *amici curiae*, the issues presented in this case are faced daily by persons in Dr. Connolly's position across the nation. Meanwhile, the public interest in the free flow of information concerning applicants for positions on hospital staffs, university faculty, admission to the bars of the various states, and other technical and professional positions, is being harmed by the judgment below. Without this Court's decision, the "underlying question persists and is agitated by the continuing activities and program of petitioners." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 179 (1968).

II. If This Court Finds Nevertheless That This Case Has Become Moot, It Should Yet Reverse The Decision Of The Court Of Appeals

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), Justice Douglas declared that when a case has become moot while on appeal it is the practice of this Court to "reverse or vacate the judgment below" because of the appellant's or petitioner's loss of the right of review. *Id.*, at 39. This practice is to prevent judgments which have become unreviewable from "spawning any legal consequences." *Id.* at 41. It has been said that it is the *duty* of appellate courts to reverse or vacate a lower court decision when the case has become moot while on appeal. *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936).

While most cases decided since *Munsingwear* have merely vacated rather than reversed the judgment below

(*see, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 n. 9 (1982)), most of the cases relied on by Justice Douglas in *Munsingwear* involved *reversal* rather than mere vacatur. See cases cited in *Munsingwear*, 340 U.S. at 39 n. 2.

The decision of the Tenth Circuit has already been published at 757 F.2d 242. To vacate that decision will prevent it from having *res judicata* effect to be sure. *See Munsingwear*, 340 U.S. 36. But as a practical matter, the decision will "spawn legal consequences," at least within the Tenth Circuit, if it is not reversed. Lower courts, especially within the Tenth Circuit, are very likely to take the vacated decision as reported to indicate how the Court of Appeals will rule under similar circumstances in the future and to enter orders consistent with that decision.

In *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466 (1916), the Court was faced with the question of "what our order should be with reference to the decree below rendered" after the case had become moot. Stating that the court's order "must be based solely upon determining what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case," (*id.* at 478) the court concluded:

> [I]n view of the nature and character of the conditions which have caused the case to become moot, we are of opinion that the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the government, there is no power to review it upon the merits, but that it should be reversed. . . .

Id. Under the circumstances, if this case is found to have become moot, the decision of the Court of Appeals should not merely be vacated but should also be reversed.

III. If This Case Is Found To Have Become Moot, This Court Should Award Double Costs And Attorneys' Fees

Dr. Burt claims to have exhausted all resources for persuing this action and that this fact forms the basis for his decision to dismiss this action and render the case moot.

As of the time the Tenth Circuit rendered its judgment, Dr. Burt still faced the expense of discovery and of conducting a trial on the merits of his claims. Presumably, he knew then of the state of his resources, yet he made no move to dismiss the action. Dr. Burt knew of Dr. Connolly's intention to petition this Court for certiorari because his counsel had been served with Dr. Connolly's motion to the Tenth Circuit to extend the stay of mandate for the purpose of preparing a petition. Yet, Dr. Burt made no attempt then to dismiss this action.

Instead, Dr. Burt waited and allowed the petition for certiorari to be prepared and filed. When this Court, through its clerk, strongly suggested that Dr. Burt respond, Dr. Burt filed his reply brief and did not let on that the case may then have been moot.

After certiorari was granted, Dr. Burt made no suggestion of mootness. Instead, his counsel entered discussions with counsel for Dr. Connolly on the content of the Joint Appendix, and the parties came to an agreement on such content. At the same time, Dr. Connolly's counsel was preparing his principal brief, which was due January

16. On January 6, a few days before Dr. Connolly's brief was due at the printer, Dr. Burt made an offer of settlement but did not inform Dr. Connolly that he intended to dismiss the action.

Dr. Connolly's principal brief was filed, as was a brief for *amici curiae* after Dr. Burt gave his consent to the filing of the *amicus* brief, with no suggestion of mootness.

Only now, when the onus is on Dr. Burt to file a principal brief in this action has the suggestion of mootness, the announcement of Dr. Burt's lack of funds to pursue this matter, been made.

Apparently, Dr. Burt has allowed Dr. Connolly needlessly to have the petition for certiorari and his principal brief prepared and filed on his behalf. Under the circumstances an award of double costs under Supreme Court Rule 50.7 would be appropriate. In addition, or alternatively, this Court should award attorneys' fees to Dr. Connolly pursuant to 28 U.S.C.A. § 1927.

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CONCLUSION

For the foregoing reasons, petitioner requests this Court to find that the action has not become moot and proceed to set this matter for oral argument. Alternatively, and if this Court finds that this case has become moot, petitioner requests that this Court enter its order reversing the decision of the Court of Appeals for the Tenth Circuit or, alternatively, vacating the decision below. Petitioner also requests that this Court award petitioner

double costs and attorneys' fees, and grant such additional and further relief as this Court deems appropriate under the circumstances.

DATED THIS 24TH DAY OF FEBRUARY, 1986.

Respectfully submitted,

PRYOR, CARNEY & JOHNSON,
a Professional Corporation
6200 South Syracuse Way, #400
Englewood, Colorado 80111
Telephone: (303) 771-6200

THOMAS L. ROBERTS
(Counsel of Record)
FRIEDRICK C. HAINES

Attorneys for Petitioner